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September 11, 2023

Re: *Tao An v. Despins*, No. 22-cv-10062

Via ECF

Honorable Valerie E. Caproni
United States District Court
Southern District of New York
New York, New York 10007

Dear Judge Caproni:

We represent Defendants Luc A. Despins and Paul Hastings LLP in *Tao An v. Despins*, No. 22-cv-10062 and are writing in response to the Court's September 5, 2023 order (Dkt. No. 37) requiring the parties to show cause why the case should not be stayed pending resolution of the appeal that Plaintiffs initiated by filing a Notice of Appeal (Dkt. No. 36) of the Court's August 2, 2023 order (Dkt. No. 29) (the "Order") granting Defendants' motion to dismiss Plaintiffs' amended complaint and Defendants' motion for Rule 11 sanctions. Defendants respectfully request that the Court refrain from staying the case and instead adjudicate their fully briefed application for reasonable attorneys' fees and costs to be awarded pursuant to the Order (*see* Dkt. Nos. 30-32, 34-35). We make this request for three reasons, each of which is explained below: Plaintiffs' appeal with respect to the Court's Rule 11 decision is premature, the Court retains jurisdiction to adjudicate the fee application, and judicial economy and efficiency counsel against issuing a stay. Indeed, staying the case will likely result in sequential appeals and considerable additional cost for Defendants and burden on the courts, for a litigation the Court has already deemed frivolous—whereas adjudicating Defendants' fully briefed fee application now will result in no prejudice to Plaintiffs.

First, Plaintiffs' appeal related to sanctions is premature because the portion of the Court's Order awarding Rule 11 sanctions is not a final, appealable order. The Second Circuit has made clear that it has "no jurisdiction, under 28 U.S.C. § 1291, to review a grant of attorney's fees and costs until the amount of fees and costs have been set." *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 87 (2d Cir. 1998) (citing *Pridgen v. Andresen*, 113 F.3d 391, 394 (2d Cir. 1997) (collecting cases)). The Second Circuit has also "rejected the doctrine of pendent appellate jurisdiction as a basis to review an undetermined award of attorney's fees, even where the question of liability for the fees has been consolidated with other decisions that were final." *Id.* Accordingly, as Plaintiffs' appeal currently stands, the Second Circuit will dismiss the portion of the appeal related to sanctions "for lack of appellate jurisdiction" "because the district court did not fix the amount of sanctions to be awarded." *Pannonia Farms, Inc. v. USA Cable*, 426 F.3d 650, 652-53 (2d Cir. 2005) (affirming the district court's award of summary judgment but dismissing, "for want of jurisdiction, that portion of the appeal dealing with the award of Rule 11 sanctions and attorney's fees and costs" where the amount of fees and costs had not yet been determined).

Second, the Court has *not* been divested of jurisdiction to adjudicate Defendants' fully briefed fee application merely because Plaintiffs prematurely appealed the Court's decision on Rule 11 sanctions. Where "there [is] no final order from which to appeal," as is the case here with respect to the Court's grant of Rule 11 sanctions, filing a notice of appeal does not divest a district court of jurisdiction. *United States v. Rodgers*, 101 F.3d 247, 252 (2d Cir. 1996); *see China Nat'l Chartering Corp. v. Pactrans Air & Sea, Inc.*,

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882 F. Supp. 2d 579, 595 (S.D.N.Y. 2012) (finding that divestiture of jurisdiction rule "does not apply where an appeal is frivolous, nor does it apply to untimely or otherwise defective appeals" (cleaned up)). Moreover, as a general matter, "notwithstanding a pending appeal, a district court retains residual jurisdiction over collateral matters, including claims for attorney's fees and costs." *Tancredi v. Metro Life Ins. Co.*, 378 F.3d 220, 225 (2d Cir. 2004); *c.f. White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 452 n.14 (1982) (an attorneys' fee issue is collateral to the decision on the merits).[1] Defendants respectfully submit that the Court should exercise the jurisdiction it retains to complete its adjudication of its sanctions motion by ruling on the amount of fees and costs owed.

Third, judicial economy and efficiency counsel against issuing a stay. If the Court issues a stay, the result would likely be two separate appeals protracted over many months: the first appeal would address the Court's grant of Defendants' motion to dismiss, and, only after that appeal concluded and the Court determined the specific amount of sanctions owed, there would be a second appeal of the sanctions decision. Such additional prolongment of this frivolous litigation could be avoided if the Court does not issue a stay but instead determines the amount of fees and costs to be awarded pursuant to the Order. After the Court fixes the amount to be awarded, Plaintiffs could, at that time, appeal that decision and consolidate that appeal with the current appeal, resulting in one appeal only. *See White*, 455 U.S. at 454 (noting that "the district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims to attorney's fees," as "[s]uch practice normally will permit appeals from fee awards to be considered together with any appeal from a final judgment on the merits"). There is no benefit to be gained by having two separate appeals. This is not the case where appellate review of the district court's grant of dismissal could inform the sanctions to be awarded. Plaintiffs' complaint is frivolous, as the Court found in its Order. The likelihood that the Second Circuit would reverse the Court's grant of dismissal is all but nonexistent.

Finally, if the Court determines that a stay is warranted, Defendants ask that the Court proceed with issuing an indicative ruling on the amount of attorneys' fees and costs to be awarded, pursuant to Rule 62.1 of the Federal Rules of Civil Procedure. An indicative ruling would allow the Second Circuit to remand the case for the purpose of determining the amount of fees and costs, *see* Rule 62.1(c), and thus decrease the likelihood of two separate appeals. *See Litovich v. Bank of Am. Corp.*, 20-cv-3154 (VEC) (S.D.N.Y. Nov. 10, 2022) ("Indicative rulings are designed to 'allow for the timely resolution of motions which may further the appeal or obviate its necessity.'" (quoting *Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon*, 297 F.R.D. 218, 221 (S.D.N.Y. 2013)).

Respectfully submitted,

/s/ Greg D. Andres
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[1] In its September 5, 2023 order (Dkt. No. 37), the Court also cited a case that stands for the proposition that fees and costs are "collateral for finality purposes." *See Paysys Int'l Inc. v. Atos IT Servs. Ltd.*, 901 F.3d 105, 107 n.2 (2d Cir. 2018) (quoting *Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 187 (2014)). That case involved an appeal of the district court's grant of voluntary dismissal with prejudice under Rule 41(a)(2)) that triggered a contractual provision awarding attorneys' fees. *Id.* It did not involve a sanctions award. As discussed above, well established Second Circuit authority holds that a sanctions award that does not fix the amount of fees awarded is not a final decision for purposes of appeal. *See, e.g.*, *Krumme*, 143 F.3d at 83 (noting that the Second Circuit has "jurisdiction to review the merits of judgments . . . before the district court has resolved the issue of attorney's fees and costs" but rejecting the argument that this rule provides "jurisdiction over the attorneys' fees issue" being appealed); *LCS Group, LLC v. Shire LLC*, Nos. 19-942, 19-2404, 2019 WL 7824613, at *1 (2d Cir. Nov. 12, 2019) (holding that "a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291" where the award of attorney's fees as a sanction "did not determine the amount of fees").